No. 83-1564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

**On Appeal From The United States District Court
For The Southern District of New York**

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether Congress' delegation of final and conclusive judicial power to a federally appointed arbitrator to adjudicate compensation liability between pesticide registrants under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(1)(D)(ii), without opportunity for substantive review in an Article III court, violates Article III of the Constitution.

2. Whether Congress' delegation of absolute legislative power to a FIFRA arbitrator to determine registrants' compensation liability, without a statutory compensation standard and without substantive review in an Article III court, violates Article I of the Constitution.

3. Whether the district court properly enjoined the use of an owner's research data by competitors to register copycat pesticides with the U.S. Environmental Protection Agency, where the compensation procedure prescribed by FIFRA for the use of his data is unconstitutional.

THE PARTIES

Pursuant to Supreme Court Rule 28.1, the parties and their publicly held parent companies and non-wholly-owned subsidiaries and affiliates are:

Abbott Laboratories

Ciba-Geigy Corporation

Ciba-Geigy Ltd. (Parent)

E. I. du Pont de Nemours & Co.

FMC Corporation

Ataka Construction & Engineering Co., Ltd.
CBV-Industria Mecanica, S.A.

Rhone-Poulenc, Inc.

Rhone-Poulenc S.A. (Parent)

Rohm and Haas Company

The Shipley Company
Advanced Genetic Sciences

Stauffer Chemical Company

Union Carbide Agricultural Products Company, Inc.

Union Carbide Corporation (Parent)
Union Carbide Australia and New Zealand Limited
Union Carbide Canada Limited
Union Carbide Mexicana, S.A. de C.V.

Uniroyal, Inc.

UNIROYAL Industri Turk A.S.
Uniroyal LIMITED (U.K.)

Velsicol Chemical Corporation

Northwest Industries, Inc. (Parent)

Zoecon Corporation

Sandoz Ltd. (Parent)

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MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16, appellees move that the judgment of the district court be affirmed.

STATEMENT OF THE CASE

This case raises the constitutionality, under Article I and Article III, of Congress' delegation of absolute, nonreviewable federal legislative and judicial power to arbitrators to adjudicate compensation disputes between pesticide registrants under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1982).

FIFRA requires that an offer of compensation be made to the owner of original pesticide research data when a

copycat or "me-too" applicant uses the originator's research to register an imitation pesticide product with the U.S. Environmental Protection Agency ("EPA"). The statutory provision in question, section 3(c)(1)(D) of FIFRA (as amended by the Federal Pesticide Act of 1978, Pub. L. No. 95-396, § 2, 92 Stat. 819, 820), vests "final and conclusive" authority in an arbitrator appointed by the Federal Mediation and Conciliation Service ("FMCS") to determine the compensation payment to the data originator and commands that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination."[1]

Appellees are developers and marketers of pesticides. They each invest heavily in innovative and expensive product research and testing, the results of which are submitted to EPA to meet the agency's requirements for the registration of pesticides under FIFRA. Faced with the use of their research data by competitors to obtain copycat registrations from EPA, but lacking a constitutionally valid forum in which to adjudicate the compensation payment that Congress mandated, appellees sought and obtained declaratory and injunctive relief from the district court.

The court declared that FIFRA's arbitrator compensation system on its face violates Article III by vesting "the essential attributes of judicial power" in private arbitrators and by barring Article III courts from making a final determination on issues of fact or law that arise in the compensation dispute. (J.S. App. 14a.) Because an agree-

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[1] The only exception is for fraud, misrepresentation or misconduct by one of the parties or the arbitrator. Section 3(c)(1)(D)(ii) (J.S. App. 20a-22a). References to the government's Jurisdictional Statement and to the appendix thereto are cited as "J. S." and "J. S. App.," respectively.

ment to pay compensation is an express statutory precondition for the use of an originator's data, the district court enjoined such use where compensation is to be determined under the invalid arbitration scheme. (J.S. App. 15a-16a.) EPA appealed the judgment directly to this Court pursuant to 28 U.S.C. § 1252. (J.S. App. 17a.)

Appellees request affirmance of the district court's decision because FIFRA's constitutional infirmity is clear on the face of the statute.

1. FIFRA requires that all pesticides be registered by EPA before they are marketed. FIFRA § 3(a). For registration, the Administrator of EPA must determine that the pesticide will perform its intended function and will be used without causing unreasonable adverse effects on the environment. FIFRA § 3(c)(5). To establish a pesticide's safety and efficacy, FIFRA authorizes EPA to require applicants for registration to perform scientific testing. FIFRA §§ 3(c)(1)(D), 3(c)(2)(A). Under this authority, EPA has promulgated comprehensive testing requirements designed to establish the physical, chemical and biological characteristics of the product.[2]

These government premarket testing requirements impose costly regulatory burdens on innovative companies. By keeping new products off the market for several years so that they can be tested and undergo EPA

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[2] EPA requires the performance of extensive scientific studies to demonstrate the acute and chronic toxicological properties of the pesticide; its effects on fish, wildlife, nontarget insects and microorganisms; the manner in which the product degrades and moves in the environment; residues of the product on food crops; metabolites of the product in plants and animals; physical and chemical characteristics; and efficacy in controlling target organisms. The current testing requirements are contained in EPA's proposed codification of 40 C.F.R. pt. 158, published at 47 Fed. Reg. 53,192 (1982).

review,[3] the regulatory scheme imposes a delay cost on the innovator because of the postponement of income that would be generated from marketing the new product.[4] Each year of regulatory delay can cost the developer tens of millions of dollars and shorten the term of any available patent protection. In addition, the actual cost of testing is high. The industry spent over one-half billion dollars on R&D in 1982 (more than $40 million for each new chemical registered), a substantial part of which is attributable to government testing requirements.[5] The regulatory process forces the innovator to bear great risk and uncertainty: He must invest substantial capital in a research program without knowing whether the results of the testing will be adverse or whether the government will withhold, restrict or delay regulatory approval.[6]

FIFRA allows imitators ("me-too registrants") to satisfy EPA's testing requirements by relying on research performed by the product innovator. FIFRA § 3(c)(1)(D)(ii).[7] Under this provision, the me-too reg-

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[3] For new products registered in 1982, it took an average of nine years after discovery to complete testing and obtain the first full EPA registration (six years for conditional registration). National Agricultural Chemicals Association, 1982 Industry Profile Survey ("NACA Survey") at 7.

[4] Office of Technology Assessment, U.S. Congress, Technological Innovation and Health, Safety and Environmental Regulation, at VIII-47 (1981); The Conservation Foundation, Product Regulation and Chemical Innovation, at IV-33 (1980).

[5] *See* NACA Survey, *supra* note 3, at 7.

[6] *See* Office of Technology Assessment report, *supra* note 4, at VIII-49; Conservation Foundation report, *supra* note 4, at IV-35.

[7] A limited exception to the mandatory data licensing requirement is contained in FIFRA § 3(c)(1)(D)(i) (J.S. App. 19a-20a). This section specifies that data submitted in support of certain new products

istrant gains immediate entry to the market, without delay, testing cost or risk, thereby avoiding the burdens of government regulation borne by the innovator alone. Because of this inequity, and to encourage innovative R&D, FIFRA provides that the original data submitter's research may be used to support the me-too applicant's registration "*only if* the applicant has made an offer to compensate the original data submitter." Section 3(c)(1)(D)(ii) (J.S. App. 20a) (emphasis added).

If the parties do not agree on the terms of compensation, the originator's only recourse is to initiate "binding arbitration" under the auspices of FMCS.[8] The arbitrator appointed by FMCS has final and unreviewable adjudicatory power to determine compensation:

> [T]he findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or misconduct by one of the parties to the arbitration or the arbitrator . . . .

Section 3(c)(1)(D)(ii) (J.S. App. 21a).

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registered after September 30, 1978 may not be relied on by other applicants for a period of ten years. The validity of this provision is not at issue in this appeal. (*See* J.S. App. 15a, para. 1.)

[8] FMCS "is in the business of helping to resolve labor disputes between employers and representative[s] of their employees." It "rarely arranges or conducts arbitration of commercial disputes" and its private labor arbitrators "do not handle commercial disputes arising under FIFRA." 45 Fed. Reg. 55,395 (1980). For this reason, FMCS appoints arbitrators to FIFRA cases from the roster of the American Arbitration Association ("AAA"). 29 C.F.R. § 1440.1 (1983).

The statute provides no standard for the arbitrator to follow in determining compensation.[9] Because of Congress' failure to specify a standard,[10] FIFRA vests in each arbitrator, in each case, unrestricted legislative power to fix a standard and unreviewable judicial authority to apply it.

2. During the pendency of the district court action, research data submitted by appellees to EPA were used to grant me-too registrations to competitors for numerous important products. For example, research data generated by appellee Stauffer Chemical Company were relied on to issue me-too registrations to PPG Industries for two major herbicides invented by Stauffer. These herbicides account for sales of hundreds of millions of dollars in the United States.

Stauffer demanded an arbitration against PPG in April 1982 for compensation on one of the herbicides. *In re Stauffer Chemical Co.* v. *PPG Industries*, No. 16 199 077 82 FIFRA (Am. Arb. Ass'n June 28, 1983). Over Stauffer's vehement objection, FMCS appointed three arbitrators to the case who had been specially trained by EPA on the factors that agency (which Congress had removed from any official role in determining compensation)

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[9] FMCS declined to publish a standard for compensation on the ground that neither FIFRA nor the legislative history "specified a formula or other guidance on the valuation of data for compensation purposes." 45 Fed. Reg. 55,394 (1980); 45 Fed. Reg. 28,105, 28,107 (1980). The district court agreed that "this is a standardless delegation of powers." (J.S. App. 13a.)

[10] Former EPA Administrator Douglas M. Costle requested Congress to establish guidelines for determining compensation, H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974, but Congress did not do so.

thought should control the arbitrators' decision[11]—factors with which Stauffer strongly disagreed.[12] The arbitration decision rendered in June 1983 left Stauffer aggrieved by awarding it a fraction of the amount of compensation claimed. FIFRA barred appeal by Stauffer of the merits of the award.[13]

3. Because appellees were confronted with the continued use of their data by competitors to support me-too registrations, they requested the district court to declare unconstitutional FIFRA's delegation of legislative and judicial powers to arbitrators to decide compensation disputes, and to enjoin the operation of FIFRA's "use provision" insofar as it permitted competitors to rely on an originator's data without providing a constitutionally valid mechanism for obtaining the compensation that the statute requires.[14]

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[11] Memorandum of Law in Support of Defendants' Motion to Dismiss or for Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment, at 86, Union Carbide Agricultural Prod . Co. v. Ruckelshaus, 571 F. Supp. 117 (S.D.N.Y. 1983).

[12] Affidavit of Andrew F. Fink, para. 5 and Exhibits 1 and 2, Union Carbide Agricultural Prod. Co. v. Ruckelshaus, 571 F. Supp. 117 (S.D.N.Y. 1983).

[13] Despite FIFRA's prohibition of judicial review, PPG brought suit to vacate the award. PPG Indus. v. Stauffer Chem. Co., Civ. No. 83-1941 (D.D.C. filed July 7, 1983). Stauffer cross-claimed that the use of its data by PPG was invalid because of the Article III violation.

[14] In the court below, appellees had previously challenged the use provision of section 3(c)(1)(D), as well as the data disclosure provision of section 10 of FIFRA, as a taking of property without just compensation, raising the same issue that is now before the Court in Ruckelshaus v. Monsanto Co., No. 83-196. After the Court of Appeals for the Second Circuit reversed an order granting a preliminary injunction, Union Carbide Agricultural Prod. Co. v. Costle, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), appellees dismissed

Under the authority of this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the district court held on cross-motions for summary judgment[15] that FIFRA's delegation of unreviewable judicial authority to arbitrators violates Article III. (J.S. App. 13a-14a.)

On appellees' claim of an unconstitutional delegation of legislative power to the arbitrators, the district court concluded that appellees "appear correct . . . that this is a standardless delegation of powers . . . utterly without judicial review," but did not rest its decision on that ground alone. (*Id.* at 13a.)

In holding that FIFRA's arbitration scheme violates Article III, the district court recognized that Congress, in accordance with *Northern Pipeline*, possesses substantial discretion to create substantive federal rights and to tailor the manner in which they may be adjudicated, including the assignment to an adjunct of some functions historically performed by judges—provided that the functions of the adjunct are limited in such a way that the essential attributes of judicial power are retained in an Article III court. (J.S. App. 14a.) The district court concluded that "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation." *(Id.)* It found that the arbitration scheme deprives the courts of any role in fact-finding and bars them from considering matters of law arising from the substantive issues in the compensation dispute. "This leaves the courts with no

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their Fifth Amendment claim, reserving the right to refile a taking claim. Appellees amended their complaint and filed a motion for summary judgment raising the Article I and Article III claims presented here.

[15] No fact material to the constitutionality of section 3(c)(1)(D) has been disputed by any party.

power to make any 'informed, final determination' of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III." *(Id.)*

The district court rendered a judgment declaring FIFRA's provisions for determination of compensation unconstitutional as a violation of Article III, and as a result, enjoined the use of a submitter's data where his compensation is to be determined under section 3(c)(1)(D). (J.S. App. 15a-16a.)[16]

THE QUESTION PRESENTED WAS CORRECTLY RESOLVED BY THE DISTRICT COURT

In enacting the arbitrator compensation scheme of FIFRA, Congress unconstitutionally delegated plenary legislative and judicial power to arbitrators appointed by the Executive Branch. The statute merges executive, legislative and judicial powers in violation of the Constitution. The Executive Branch appoints the arbitrators, who are vested with the absolute legislative power to set compensation on a case-by-case basis, and the nonreviewable judicial power to adjudicate compensation liability. FIFRA thus violates the principle of separation of powers that is at the core of the Constitution's grant of Article I and Article III authority.

Appellees have been harmed by this scheme because they have no constitutional forum available in which they

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[16] In a second count of their complaint, appellees also challenged FIFRA's grant of authority to EPA to disclose trade secret information on the ground that it effects a retroactive deprivation of property rights without due process of law. The district court found that the statute's withdrawal of trade secret protection did not violate due process requirements regardless of whether it upset settled expectations. (J.S. App. 9a.) That issue is not before the Court in this case.

can obtain the statutory compensation that Congress required they be paid as a condition for the use of their research data by competitors to register me-too products. Appellees' right to adjudicate their compensation claims in a constitutionally valid tribunal is violated by this scheme.

The district court properly granted a judgment declaring FIFRA's arbitrator compensation scheme unconstitutional and enjoining any use of data that is conditioned upon the unconstitutional compensation determination. The constitutional flaws in the use-compensation system cannot be cured by severing any portion of it. Legislative action is necessary to bring the compensation scheme into conformity with the requirements of Article I and Article III.

The judgment of the district court should be affirmed.

I. THIS CASE IS PROPERLY BEFORE THE COURT

A. The Court's Decision In *Ruckelshaus v. Monsanto* Cannot Dispose Of This Case

The government suggests that this case can be disposed of summarily in accordance with the Court's forthcoming decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (argued Feb. 27, 1984). (J.S. 7, 13.) This self-serving tactic attempts to blur the major distinctions between the *Union Carbide* and *Monsanto* cases and prompt the Court to reverse the district court without a hearing on the merits of the appeal. According to the government, "[a]ll the issues presented here [in *Union Carbide*] are also under consideration in *Monsanto*." (*Id.* at 7.) In reality, the constitutional issue raised by *Union Carbide* is entirely different from and wholly independent of the question involved in *Monsanto*.

The issue in *Union Carbide* is whether the use of data under FIFRA § 3(c)(1)(D) should be enjoined because the statute's arbitrator compensation scheme violates Article I and Article III of the Constitution. That question is *not* before the Court in *Monsanto*. There, the Court is asked to decide whether FIFRA's use and disclosure of data effect a taking of property in violation of the Fifth Amendment. The Court in *Monsanto* is *not* called upon to review the constitutionality of FIFRA's arbitrator compensation scheme under Articles I and III. Regardless of the Court's ruling on the Fifth Amendment claim in *Monsanto*, the constitutionality of the arbitrator compensation scheme under Articles I and III will remain a separate, unresolved issue ripe for review in this case.

The arbitrator compensation scheme is not at issue in *Monsanto* because the government conceded there that FIFRA's "compensation scheme was not meant to provide . . . 'just compensation' within the meaning of the Fifth Amendment." Jurisdictional Statement at 25, *Ruckelshaus* v. *Monsanto Co.*, No. 83-196. Thus, if the Court determines in *Monsanto* that FIFRA's use of data effects a taking, there is no dispute as to the failure of FIFRA to provide just compensation.[17]

Both parties in *Monsanto* are in agreement that the issue of the constitutionality of the arbitrator compensation system is not properly before the Court in that case. *See* Brief of Appellee Monsanto Company at 40 n.56; Brief for the Appellant at 44-45. As a result, because a "constitutional question . . . must be presented in the context

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[17] When the *Monsanto* case reached this Court, EPA conceded for the first time that the FIFRA arbitration provision does not provide just compensation. Because EPA had not conceded this point earlier, the district court ruled on the question of whether the arbitration provision satisfied the Fifth Amendment. *See* Monsanto Co. v. Acting Adm'r, EPA, 564 F. Supp. 552, 566-67 (E.D. Mo. 1983).

of a specific live grievance," the Court cannot review the Article I and Article III issues there. *See Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). Appellant's suggestion, therefore, that *Union Carbide* can be summarily disposed of by *Monsanto* is devoid of merit and disingenuous. The Court should rule on the issue raised by EPA's appeal in *Union Carbide*—the constitutionality of the arbitrator compensation scheme under Articles I and III—either by granting appellees' Motion to Affirm or by noting probable jurisdiction and deciding this case following briefing and argument on the merits.

B. Appellees' Claims Are Ripe

The district court correctly concluded that appellees' challenge to FIFRA's use-compensation system is ripe. (J.S. App. 10a n.2.) It is ripe for two reasons:

(1) The issues are fit for judicial decision—the constitutionality of the arbitrator compensation scheme is purely a question of law, and the government has not disputed any fact material to that issue.

(2) Appellees are suffering economic harm because their research data have been used by competitors to register copycat products, and they do not have a constitutionally valid forum in which to adjudicate the compensation payment that Congress mandated. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Appellees' "personal right . . . to demand Article III adjudication" of the federal compensation claim therefore is infringed. *Pacemaker Diagnostic Clinic of America* v. *Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

In alleging that the statute inflicts no harm on appellees, and that appellees' injury is "speculative" in the absence of an arbitration award (J.S. 8), the government

completely misperceives the gravamen of appellees' complaint. Appellees already have experienced severe economic loss because of the "me-tooing" of their products without a viable forum in which to obtain statutory compensation. In the absence of the district court's injunction, appellees would continue to suffer injury as more of their research is used by me-too registrants, while being unable to adjudicate the compensation they are owed in a constitutionally valid tribunal. Thus, as the district court held below, whether an arbitration has been completed has no bearing on ripeness:

> [I]t is not the results of any arbitration procedure that plaintiffs protest, or even the internal procedure thereof, rather *it is the statutory compulsion to seek relief through arbitration* to the exclusion of any other mechamism. *That issue is clearly ripe for resolution.*

(J.S. App. 11a n.2) (emphasis added).[18]

The district court found that there is nothing to be gained by delaying adjudication of appellees' constitutional claims (J.S. App. 11a n.2) because the issue is a "purely legal one." *Abbott Laboratories* v. *Gardner*, 387

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[18] The Court's decision in Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979), supports the district court's finding of ripeness. ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Id.* at 298.) Unlike the situation in *Babbitt*, the arbitration process has been triggered because appellees here have had their research data me-too'd and are now compelled to seek compensation through the unconstitutional arbitration scheme. In *Babbitt*, the arbitration remedy was not ripe because the preconditions for arbitration (an employees' strike followed by an application by the employer for a temporary restraining order) had not been met. *Id.* at 305. Moreover, in that case the district court raised the constitutionality of the arbitration provision *sua sponte*; the union "never contested the constitutionality of the arbitration clause." *Id.*

U.S. 136, 149 (1967). The Court would be "in no better position later than [it is] now to decide this question." *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 82 (1978) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 145 (1974)).

Finally, even if actually having to endure an unconstitutional arbitration proceeding were a prerequisite to ripeness, one of the appellees, Stauffer Chemical Company, already has done so. Under FIFRA, no appeal from that decision is possible. Indeed, Stauffer has met all of the conditions itemized by the government as a purported prerequisite to ripeness. (J.S. 8.) Therefore, even under the government's test, this action is ripe.[19]

II. FIFRA'S ARBITRATOR COMPENSATION SCHEME IS UNCONSTITUTIONAL

A. The Delegation Of Nonreviewable Judicial Power To Arbitrators Violates Article III

Article III, Section 1, of the Constitution commands that the judicial power of the United States be exercised by judges who have the protections prescribed by that article: life tenure and nondiminishable compensation.

The district court correctly found that the arbitrator compensation provision of FIFRA violates this constitutional mandate by assigning "the judicial power of the United States" to arbitrators whose compensation

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[19] In Ruckelshaus v. Monsanto, No. 83-196, the parties agreed that the Article III issue was not ripe because the government had conceded that the FIFRA compensation scheme was not meant to provide "just compensation" within the meaning of the Fifth Amendment. *See* discussion *supra* at 11. The constitutionality of the compensation scheme under Article III simply was not an issue in that case. Thus, the parties' stipulation in that case has no bearing on this appeal.

and selection in each case are subject to the Executive's control. The arbitrator is given plenary power to adjudicate the liability of one individual to compensate another under federal law. He is not a fact-finding adjunct to a federal judge; instead, he has been vested by Congress with the "final and conclusive" authority to decide all questions of law and fact. The scheme does not retain the "essential attributes of judicial power" in Article III courts, but to the contrary, specifies that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination." Section 3(c)(1)(D)(ii). Without any purported justification, or any apparent thought given to the adverse constitutional ramifications, Congress has devised a scheme which violates the principles of separation of powers and judicial impartiality that are at the heart of Article III.

In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that the assignment by Congress to non-Article III bankruptcy judges, under the Bankruptcy Act of 1978, of the judicial power to adjudicate Marathon's liability to Northern, violates Article III. *Id.* at 87, 91. The plurality opinion in *Northern Pipeline* stated that Article III prohibits Congress from vesting jurisdiction in Article I legislative courts to decide matters of "private rights"—specifically, "the liability of one individual to another under the law as defined." *Id.* at 69-70. Although Congress may create Article I tribunals to act as fact-finding adjuncts to constitutional courts for the adjudication of substantive federal rights, the "essential attributes of judicial power" must be reserved in the Article III courts themselves. *Id.* at 81.

The district court here concluded that "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation" (J.S. App. 14a):

> The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters. The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.

(Id.) The government virtually concedes that the statute is unconstitutional without full judicial review. (J.S. 12.)

As in *Northern Pipeline*, the rights at issue here are "private rights," because they involve "the liability of one individual to another under the law as defined." *Northern Pipeline*, 458 U.S. at 69-70. The "public rights" doctrine does not apply here. That doctrine applies only to cases in which the government is a party to the dispute. *Id.* at 67-68, 69-70. Here the government is not a party to the arbitration.

The government's faulty assertion that substantive federal rights need not be adjudicated in accordance with Article III—a privilege it would reserve only for "traditional common law rights" (J.S. 11)—is defeated by *Northern Pipeline*. Although the plurality opinion in *Northern Pipeline* recognizes that Congress has discretion to prescribe the manner in which federal statutory rights are adjudicated, and may assign some functions to an adjunct, the opinion makes clear that the functions of the adjunct must be limited in such a way that the essential attributes of judicial power are retained in Article III

courts. 458 U.S. at 80-81.[20] Here the essential attributes of judicial power plainly are not.

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), the Court ruled that the adjudication of federal statutory rights is subject to Article III requirements. "*Crowell* involved the adjudication of congressionally created rights" concerning compensation between employers and employees under a federal statute. *Northern Pipeline*, 458 U.S. at 78. The adjudication in *Crowell* was held to be "one of private right," subject to Article III. 285 U.S. at 51. The Court found the adjunct scheme in *Crowell* consistent with Article III because "[t]he agency was thus left with the limited role of determining 'questions of fact,' " and "every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." *Northern Pipeline*, 458 U.S. at 78 (citing *Crowell*, 285 U.S. at 44-45, 48). The Court upheld the compensation scheme "in view of these limitations upon the Compensation Commission's functions and powers." 458 U.S. at 78.

No comparable limitations apply to the FIFRA arbitration scheme. It is an adjudicatory device that is especially abhorrent to the values that Article III was intended to further: "a guarantee of judicial impartiality" and "the checks and balances of the constitutional structure." *Northern Pipeline*, 458 U.S. at 58. Under FIFRA, the arbitrator who adjudicates compensation is uniquely be-

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[20] See also Justice White's dissenting opinion:

> There are, I believe, two separate grounds for today's decision. . . . Second, *regardless of the source of the law that governs the controversy*, Congress is prohibited by Art. III from establishing Art. I courts, with three narrow exceptions.

Northern Pipeline, 458 U.S. at 94 (White, J., dissenting) (emphasis added).

holden to the Executive Branch. He is dependent upon the Executive agency, FMCS, for his appointment to every case.[21] His compensation is subject to the Executive's control.[22] Only arbitrators who have submitted to "training" by an Executive agency, EPA, on the compensation factors it believes appropriate are permitted to serve.[23] No statutory standard limits the arbitrator's discretion, nor can any court set the decision aside, even if it is arbitrary, unsupported by the record, or contrary to law.

The government's principal defense for this scheme is to argue that binding arbitration of statutorily created entitlements does not offend any requirement of procedural due process. (J.S. 10.) This proposition is irrelevant. Like the bankruptcy court system struck down in *Northern Pipeline*, FIFRA's arbitrator compensation scheme clearly contravenes Article III, whether or not it offends due process as well.

The government cannot cite a single decision, by this Court or by any other, which has upheld an assignment of unreviewable judicial power to a non-Article III tribunal to adjudicate liability between individuals under federal law, without statutory standards and without an opportunity for substantive review in an Article III court.

B. FIFRA's Delegation Of Absolute Legislative Power To Arbitrators Violates Article I

Article I, Section 1, of the Constitution vests "all legislative powers" in the Congress of the United States.

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[21] Section 3(c)(1)(D)(ii) gives FMCS the authority "to appoint an arbitrator" for each dispute.

[22] FMCS delegated the initial authority to fix the arbitrator's compensation to the AAA and retained final decision-making authority. 29 C.F.R. § 1440.1; 29 C.F.R. pt. 1440 app. §§ 41, 42 (1983).

[23] *See* discussion *supra* at 6-7.

If the constitutional principle of separation of powers is to retain its vitality, FIFRA's delegation of absolute legislative power to arbitrators must be struck down. As the district court found, "this is a standardless delegation of powers . . . utterly without judicial review." (J.S. App. 13a.)

FIFRA says nothing more than that the me-too applicant must "compensate" the data originator. Section 3(c)(1)(D)(ii). Congress has abdicated its responsibility to set compensation standards to an ad hoc group of politically nonresponsive arbitrators, appointed by FMCS individually to each dispute, each of whom has unfettered discretion to apply arbitrarily any compensation standard he may fancy. Each individual arbitrator has final and conclusive power to make the important social policy choice on which Congress defaulted: how a product innovator who bears the brunt of government-mandated testing and regulation should be compensated when competitors use his research to market generic imitations of his product. The choices before the arbitrator—whether to base compensation on the fair market value of the use of the data, on the impact of regulation on the innovator, on the replacement cost of the research data, or on some other theory—implicate a wide range of socioeconomic values concerning incentives for innovation and competition policy.

The delegation under FIFRA is unprecedented. Appellees know of no instance in which Congress has sought *both* to impose a completely standardless delegation of legislative power *and* to bar the courts from any substantive review of the delegatee's exercise of the power. Unlike other cases in which broad delegations have been upheld, here no necessity has been shown either for the absence of an "intelligible principle" to guide the

arbitrator's exercise of discretion or for the preclusion of court review "to test that exercise against ascertainable standards."[24] *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). *See also INS* v. *Chadha*, 103 S. Ct. 2764, 2785 n.16 (1983). There are no precedents to guide the arbitrator because each arbitration is *sui generis*. *Compare Lichter* v. *United States*, 334 U.S. 742, 783 (1948). Because each arbitrator is appointed on a case-by-case basis, the delegatee has no residual authority or opportunity to develop continuity of policy. *Compare United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

FIFRA's delegation is an affront to the Constitution's separation of powers. If this delegation can be sustained, the principle of separation of powers has become meaningless. Appellees ask that this egregious deviation from the system of checks and balances established by the Constitution be corrected so that appellees' right to a constitutionally proper determination of compensation for use of their data can be vindicated.

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[24] Indeed, former EPA Administrator Douglas Costle stated during hearings on the 1978 FIFRA amendments that EPA "lacks expertise" in determining compensation and asked Congress to "make more explicit what factors it feels are pertinent in determining reasonable compensation." H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974.

III. THE RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER

A. The District Court Correctly Enjoined The Use Of Data Subject To The Invalid Arbitrator Compensation Scheme

Having found FIFRA's arbitrator compensation scheme unconstitutional, the district court permanently enjoined EPA "from permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)." (J.S. App. 15a, para. 2.) This relief was proper because the statute plainly states that the use of data is predicated upon and inseparable from the procedure for obtaining compensation.

Section 3(c)(1)(D)(ii) authorizes a me-too applicant to rely upon an originator's data "*only* if the applicant has made an offer to compensate" (emphasis added). Furthermore, the statute provides that "the right to compensation [is] for the use of the data." *Id.* Thus, FIFRA establishes an inextricable link between the compensation procedure and the use of data.

Congress' basic purpose in requiring compensation was to prevent "just plain stealing" the use of data. *Federal Environmental Pesticide Control Act: Review of FEPCA Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 11 (1973) (statement of Rep. Poage, Chairman, House Committee on Agriculture). As a result, Congress would not have permitted the use of data in the absence of a procedure for obtaining compensation. This was confirmed by Senator Patrick Leahy, a principal sponsor of the arbitration provision:

> [W]e are not allowing free use of . . . data by competitors. If a registrant wishes to use the data generated by another company to support their registra-

> tion then he must pay compensation for the data . . . .

123 Cong. Rec. 25,706 (1977). Congress viewed compensation as the *quid pro quo* for authorizing the use of data. Accordingly, the use-compensation system was enacted as "a single statutory grant of jurisdiction" which cannot be severed. *See Northern Pipeline*, 458 U.S. at 87 n.40.

Permitting the use of data in the absence of a procedure for obtaining compensation would have provided me-too registrants the "free ride" which Congress intended to prevent. *See* S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4023, 4091-92. For this reason, the district court's injunction against the use of data effectuated rather than contravened congressional intent. *See Sathon, Inc.* v. *American Arbitration Association*, No. 83 C 6019, slip op. at 6, 9 n.6 (N.D. Ill. Mar. 30, 1984), *appeal docketed*, No. 84-1540 (7th Cir. Apr. 6, 1984) (me-too registrant estopped from challenging duty to arbitrate after using another company's data to obtain me-too registration). Enjoining the use of data, therefore, was the only proper relief the district court could have granted.

B. The Relief Proposed By The Government Is Inappropriate

The government's simplistic proposal is to "save" the unconstitutional arbitrator compensation system by striking the statute's no-review clause. (J.S. 12-13.) That clause, however, is intrinsic to and inseparable from the arbitrator compensation scheme enacted by Congress. Furthermore, striking the clause would not cure the statute. No right of review would arise, much less the "full judicial review" assumed by the government. (*Id.* at 12.) The Court would have to overstep its judicial role and engage in lawmaking to construct an arbitrator compen-

sation scheme that conforms to the requirements of Article I and Article III.

Whether the no-review clause can be severed from the arbitrator compensation provision is a question of congressional intent. *See United States* v. *Jackson*, 390 U.S. 570, 586 (1968); *Lynch* v. *United States*, 292 U.S. 571, 586 (1934); *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). According to the government, "there is nothing in the legislative history to suggest that Congress would have failed to enact the [arbitrator compensation] provision without such a limitation [on judicial review]." (J.S. 12.) To the contrary, the legislative history clearly indicates that Congress' very purpose in restructuring section 3(c)(1)(D) in 1978 was to remove the determination of compensation from the realm of the judiciary. The no-review clause was an integral part of this congressional scheme.

Prior to 1978, compensation was determined by EPA in adjudicatory proceedings and was appealable to the federal district courts. *See* FIFRA § 3(c)(1)(D), Pub. L. No. 92-516, sec. 2, 86 Stat. 973, 979-80 (as enacted in 1972); FIFRA § 3(c)(1)(D), Pub. L. No. 94-140, sec. 12, 89 Stat. 751, 755 (as revised in 1975). In 1977 EPA Administrator Douglas M. Costle explained to Congress that the agency lacks the expertise to judge compensation. H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974. As a result, Congress decided to abandon the administrative/judicial system of compensation that had been in effect since 1972. Senator Leahy explained that determining compensation "[should] *not require active governmental involvement* . . . [and] should be determined to the fullest extent practicable, *within the private sector*." 123 Cong. Rec. 25,710 (1977) (emphasis added). To effectuate this scheme, Congress deliberately removed EPA from any

substantive role in the determination of compensation. Adjudicatory power was vested in private arbitrators, whose findings and determinations were made "final and conclusive" and not subject to review. FIFRA § 3(c)(1)(D)(ii).

The no-review clause, therefore, is an inextricable part of the compensation scheme. Striking the no-review clause would defeat the congressional purpose of reassigning the determination of compensation to private arbitrators. Congress would not have intended that scheme to stay in force absent a no-review clause. As a result, the clause is not severable from the remainder of the arbitrator compensation system.[25]

The government baldly asserts that "the only appropriate relief would be to strike down the limitation on review by an Article III court, since there can be no doubt that the scheme would be constitutional *so long as full judicial review was available.*" (J.S. 12 (emphasis added).) Nowhere does appellant explain why or how a right to "full judicial review" would be created by striking the no-review clause.

"The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U.S.

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[25] FIFRA's "severability" provision, 7 U.S.C. § 136x (1982), is not a blanket authorization to fragment otherwise indivisible provisions of the Act. A severability provision does not take precedence over congressional intent to keep a statutory provision intact. FIFRA's severability provision states that the invalidity of one provision of the Act "shall not affect other provisions . . . *which can be given effect without regard to the invalid provision.*" FIFRA § 30 (emphasis added). That is not the case with § 3(c)(1)(D). Because Congress intended determination of compensation to be a private matter, the arbitration scheme enacted by Congress in 1978 cannot be given effect without regard to the no-review clause.

287, 297 (1981). In view of the clear congressinal intent in 1978 to *remove* EPA and the courts from any role in judging compensation, a cause of action for review of FIFRA arbitration awards cannot be implied in section 3(c)(1)(D). Furthermore, no other section of FIFRA creates a right of review, and no right of review can be implied in any other federal law.

Even if striking the no-review clause were to give rise to some indeterminate form of judicial review, that in itself would not satisfy the requirements of Article III. *See Northern Pipeline*, 458 U.S. at 86-87 n.39. The district court in this case found that the "absolute assignment of power to arbitrators [under section 3(c)(1)(D)] is an impermissible intrusion on the judiciary." (J.S. App. 13a-14a.) Thus, in the case of section 3(c)(1)(D), the "constitutional requirements for the exercise of the judicial power" are *not* met "at all stages of adjudication." *(Id.)* As a result, merely striking the no-review clause would not cure this fatal defect of the arbitrator compensation system.

Further, striking the no-review clause would not supply the standards that are needed to guide the arbitrator's discretion, or a structure that would assure consistency and continuity. It would not cure the Article I violation.

It is axiomatic that Congress, not the courts, has the power to legislate. But legislate is precisely what this Court would have to do to "save" the statute. (*See* J.S. 13.) The Court would have to totally restructure the statutory use-compensation system. Specifically, the Court would have to decide whether arbitrators should continue to be utilized in the determination of compensation, and if so, how to delineate their role so as to not offend Article III. Furthermore, in formulating a new

compensation scheme, the Court would have to decide which Article III courts should be vested with jurisdiction over compensation, and how to circumscribe their authority so as to ensure that they will exercise all the essential attributes of judicial power. Finally, to satisfy Article I, the Court would have to promulgate the standards that should be used to determine compensation. Clearly, these are decisions for Congress and not the Court.

Restructuring the arbitrator compensation system cannot be accomplished through statutory interpretation. Legislative discretion must be exercised in devising a new statutory scheme. In its discretion, Congress very well may choose an approach radically different from the current compensation system. The demonstrated congressional willingness in 1978 and again in 1982 to fundamentally alter the statute underscores the need for the Court to defer to the discretion of Congress and thereby preserve the separation of powers.[28]

The Court, therefore, should limit its role in this appeal to affirming the district court's judgment.

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[28] In 1982 the House of Representatives, joined by the Senate Committee on Agriculture, Nutrition and Forestry, approved legislation that would have elminated the compensation system altogether, in favor of other types of research incentives. *See* S. Rep. No. 551, 97th Cong., 2d Sess. 9 (1982).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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